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Court of Appeals No. 58379-4-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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COURT OF APPEALS
STATE OF WASHINGTON
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GOLD STAR RESORTS, INC.,

Respondent / Cross-Appellant,

v.

FUTUREWISE,

Appellant, and

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS
BOARD and WHATCOM COUNTY,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR WHATCOM COUNTY
THE HONORABLE STEVEN J. MURA
Whatcom County Superior Court No. 05-2-02405-1

REPLY BRIEF OF FUTUREWISE

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I.
INTRODUCTION

Substantively, Gold Star continues to ignore the plain language of the Growth Management Act (“GMA”), Chapter 36.70A RCW. The statute clearly and unambiguously requires cities and counties to review and evaluate their Comprehensive Plans and development regulations every seven (7) years and, if needed, revise and update the Comprehensive Plans and development regulations to ensure continuing compliance with the GMA. RCW 36.70A.130(1)(a).

Procedurally, Gold Star presents no rational basis for the Court to ignore the fact that Gold Star did not address the issue of Rural Densities before the Board, which precludes any consideration of the issue of Rural Densities in this appeal. RCW 34.05.554; CP 1410-1419. Gold Star also continues its repetitive manta that the Board implemented a “bright-line rule” regarding Rural Densities, while repeatedly ignoring the fact that Whatcom County conceded that the Rural Densities designated in the 2005 Whatcom County Comprehensive Plan violated the goals and requirements of the GMA. CP 1093-94.

Finally, as a matter of public policy, Gold Star’s entire argument is premised on self-interest, thereby ignoring the primary goals and

objectives of the GMA to protect the public interest.¹ Even though provisions of the 2005 Whatcom County Comprehensive Plan violated the objectives and requirements of the GMA, Gold Star wishes to preserve the status quo solely because Gold Star does not wish to see any change to the applicable land use regulations for one piece of its property. The Court should focus on the public interest, and ensure that all Comprehensive Plans and corresponding development regulations are consistent with both established principles of growth management and with established statutory requirements.

For the reasons set forth herein and set forth in the Opening Brief, Futurewise respectfully requests that the Court reverse the determination of the Whatcom County Superior Court and reinstate the Findings of Fact and Conclusions of Law set forth in the Final Decision & Order (“FD&O”) of the Western Washington Growth Management Hearings Board (“Board”). CP 1546-1583.

¹ The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state. It is in the public interest that citizens, communities, local governments, and the private sector cooperate and coordinate with one another in comprehensive land use planning. Further, the legislature finds that it is in the public interest that economic development programs be shared with communities experiencing insufficient economic growth. RCW 36.70A.010 (emphasis added).

II.
ARGUMENT

A. Board Deference to Comprehensive Plans Does Not Permit Deference to Plans that are “Clearly Erroneous”

The Board is required “to grant deference to counties” in their development plans and determinations. RCW 36.70A.3201. However, a local government’s “discretion is bounded by the goals and requirements of the GMA.” RCW 36.70A.3201; *Lewis County v. Western Washington Growth Mgmt. Hearings Bd.*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006).

The recent decision of the Washington Supreme Court relied upon by Gold Star does nothing to change the established parameters of deference:

[W]e now hold that deference to county planning actions, that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general. While we are mindful that this deference ends when it is shown that a county’s actions are in fact a “clearly erroneous” application of the GMA, we should give effect to the legislature’s explicitly stated intent to grant deference to county planning decisions.

Quadrant Corporation v. Growth Mgmt. Hearings Bd., 154 Wn.2d 224, 238, 110 P.3d 1132 (2005)(emphasis added).

The issue before the Court is not, as Gold Star suggests, whether the Board showed the proper deference to the decisions of Whatcom County. The issue is whether the Board correctly determined that the

decisions of Whatcom County were “clearly erroneous.” If so, then the issue of appropriate deference is moot because a “clearly erroneous” decision by Whatcom County is not entitled to any deference.²

The Board reviewed ample evidence in support of its ruling that certain decisions of Whatcom County with regard to the development and adoption of the 2005 Whatcom County Comprehensive Plan (“2005 WCCP”) were “clearly erroneous.” CP 1546-1583. Because Gold Star failed to rebut that evidence, and because Whatcom County did not even appeal the Board’s decision, Futurewise respectfully submits that the issue of appropriate deference is not an issue in this case.

B. The Periodic Review Requirements of RCW 36.70A.130 are Clear and Unambiguous

Contrary to Gold Star’s claim, the GMA does not force Whatcom County, or any other jurisdiction planning under the GMA, to “start from scratch” and draft a new WCCP and new development regulations every seven years. Rather, the GMA requires Whatcom County to review the existing WCCP and corresponding development regulations to determine if any portion did not comply with the goals and requirements of the

² Furthermore, the Board’s interpretation of the GMA is entitled to deference by this Court. *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998); *Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 801, 959 P.2d 1173 (1998).

GMA.³ RCW 36.70A.130(1)(a). If non-compliant provisions are detected, then Whatcom County is required to revise and correct the non-compliant provision(s) in the updated WCCP.⁴ RCW 36.70A.130. Any provisions of the updated WCCP that did not comply with the GMA would be subject to appeal and review by the applicable Growth Board.⁵ RCW 36.70A.130(1)(d); .280(1). Put simply, Whatcom County does not have to start anew every seven years, but Whatcom County does have to follow the law to ensure consistent compliance with established statutory principles of growth management.

The Court should reject Gold Star's attempted obfuscation, and focus on the clear and unambiguous language of RCW 36.70A.130:

(1)(a) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. A county or city shall take legislative action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations

³ Whatcom County did not revise its regulations because Futurewise challenged them; rather, Whatcom County revised its land use regulations because they were required by law to do so. RCW 36.70A.130(1)(a); Gold Star Memorandum at 34.

⁴ If Whatcom County had determined that portions of the existing WCCP and the corresponding development regulations were consistent with the goals and requirements of the GMA, then Whatcom County could have reincorporated those provisions into the 2005 WCCP so long as Whatcom County "showed its work" to ensure compliance with GMA requirements. RCW 36.70A.130.

⁵ Such review would not represent a "collateral attack," because each Comprehensive Plan and any associated development regulations are required to undergo periodic review in order to ensure that statutory requirements are satisfied.

comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section. The review and evaluation required by this subsection may be combined with the review required by subsection (3) of this section. The review and evaluation required by this subsection shall include, but is not limited to, consideration of critical area ordinances and, if planning under RCW 36.70A.040, an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management.

RCW 36.70A.130(1).⁶

The periodic review requirements of RCW 36.70A.130(1)(a) mean that every jurisdiction must review, revise, and update its Comprehensive Plan and any corresponding development regulations on a regular basis to ensure that GMA requirements are consistently achieved. The Washington Supreme Court recently discussed the importance of the periodic review requirements of the GMA:

Planning is not a one time thing. King County originally adopted its Growth Management Comprehensive Plan in 1994. King County is required to review and, if needed, revise its comprehensive plan and implementing ordinances every seven years, most recently by December 1, 2004. RCW 36.70A.130(4)(a).

.....

⁶ 2002 Laws Chapter 320 § 1. This version of the statute was in place during the timeframe when Whatcom County updated and revised the 2005 WCCP. The statute was revised effective May 2005, and the revised version attached to Futurewise's Opening Brief as Appendix A. The 2005 revision does not change the substance of the periodic review requirement; instead, the revision imposed only structural changes that make the statute even more clear and unambiguous regarding the requirements of local jurisdictions to periodically update and revise their comprehensive plans and development regulations according to the schedule set forth in the GMA.

Read in context, RCW 36.70A.130 requires that counties continuously review, evaluate, and revise their comprehensive plans in light of the best available science, the experience of the county with the current regulations, the input of the population, and the ever changing needs and realities of the use of land.

1000 Friends of Washington et.al v. McFarland, ___ Wn.2d ___ at *3 (2006 WL 3759359) (Plurality Opinion). The Supreme Court also concluded that the Legislature did not intend to give some sort of special status to original GMA Comprehensive Plans and development regulations, thereby confirming that the continual process of updating and revising land use regulations is an integral part of the structure established by the GMA. *1000 Friends of Washington et. al v. McFarland*, 2006 WL 3759359 at *10-11.

This recent holding of the Supreme Court is consistent with the holdings of the Western and the Central Puget Sound Growth Management Hearings Boards (“Growth Boards”). Both Growth Boards have held that RCW 36.70A.130(1)(a) requires each city and county review its comprehensive plan and development regulations to ensure compliance with the requirements of the GMA.⁷ Moreover, the Growth Boards have confirmed that if any provision(s) of a Comprehensive Plan or

⁷ *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, WWGMHB Case No. 04-2-0010, Order on Motion to Dismiss at pp. 7, 14 (2004); *FEARN, et al. v. City of Bothell*, CPSGMHB Case No. 04-3-0006c, Order on Motions at p. 9 (2004).

development regulations does not comply with the GMA, then that provision must be updated by the deadlines in RCW 36.70A.130.⁸

Gold Star offers no legal support for its tortured attempt to limit the reach of RCW 36.70A.130(1)(a), because no such support exists. Gold Star's strained interpretation selectively rewrites the periodic review provision of the GMA to read:

(1)(a) Each comprehensive land use plan and development regulations shall be subject to a **continuing but limited** review and evaluation by the county or city that adopted them. A county or city shall take legislative action to review and, if needed, revise *certain portions of* its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of this chapter according to the time periods specified in subsection (4) of this section. The review and evaluation required by this subsection **is the same as ~~may be combined with~~** the review required by subsection (3) of this section. The review and evaluation required by this subsection shall **only** include, ~~but is not limited to~~, consideration of critical area ordinances and, if planning under RCW 36.70A.040, an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management.⁹

Gold Star's goal is not to promote correct principles of statutory

⁸ *Id.*; see also *1000 Friends of Washington v. Thurston County*, WWGMHB Case No. 05-2-0002, Final Decision and Order at p. 2 (2005).

⁹ As discussed in Section II.D., *infra*, Gold Star's selective interpretation would also add the following additional language to the statute: "*This periodic review requirement shall not apply to any provision of a Comprehensive Plan previously adopted under the GMA, as each local jurisdiction is free to leave such development regulations in place unless changed circumstances dictate otherwise.*" It is truly "inconceivable" that the Legislature would have contradicted itself by adding such language, either explicitly or impliedly, to RCW 36.70A.130(1)(a). See Gold Star Memorandum at 36.

interpretation, but instead to facilitate a revision to the 2005 WCCP that precludes any future change to the land use designation for Gold Star's property.¹⁰

Limiting the required periodic review only to critical areas and population effectively vitiates one of the most important aspects of the GMA—the requirement for a continuous and dynamic process which ensures that all of the provisions of local land use plans are kept current and effective. RCW 36.70A.130(1)(a). As noted by our Supreme Court:

[A] far more reasonable way to read the statutory schema as a whole is that the process creates (hopefully) ever improving management of growth, in light of all of the different legitimate concerns of the stakeholders in the system. Nor do we find any evidence of legislative intent to treat the original comprehensive plan so differently from revised comprehensive plans. Instead, the continual process of revising management of land is itself an integral part of the structure established by the GMA.

1000 Friends of Washington v. McFarland, 2006 WL 3759359 at *24.

Gold Star's desire to maintain in perpetuity the same land use designation for one piece of its property represents an insufficient basis (both factually and legally) to override a statutory requirement which impacts hundreds of thousands of acres of property throughout Whatcom County, and millions of acres of property throughout Washington State.

¹⁰ Gold Star attempts to argue on behalf of Whatcom County, a position for which Gold Star has no authority. CP 114-117, 222-226; Gold Star Memorandum at 35-36.

Gold Star has done nothing with its property for over 30 years,¹¹ yet could have established a sense of finality with respect to applicable land use regulations by “vesting” the property through the filing of a permit application. See *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 867–68, 872 P.2d 1090 (1994); *Friends of the Law v. King County*, 123 Wn.2d 518, 520, 821 P.2d 539 (1992); CP 1574-1575. By willfully refusing to act, Gold Star, like all landowners, must expect and abide by changes to land use regulations over the long-term. CP 1574-1575; *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1379 (1997).

Validation of Gold Star’s attempt to preserve the status quo, in contravention of specific statutory authority for periodic review, will impact all of the property covered under any Comprehensive Plan and any corresponding development regulations. Gold Star has no right, duty, or responsibility to manipulate established principles of land use planning based on its own self-interest. The plain language of RCW 36.70A.130(1)(a) establishes the error of Gold Star’s arguments, and provides the basis for reversing the decision of the Whatcom County Superior Court.

¹¹ Gold Star Memorandum at 1.

C. The Board Has Not Yet Determined the Validity of the LAMIRD Boundaries

The Board ruled that Whatcom County must first revise its “Designation Descriptors,” and then re-evaluate LAMIRD designations. CP 1562-1564. Thus, in contravention to Gold Star’s claims, the Court does not need to address the issue of whether the LAMIRDs in the 2005 WCCP were valid. Gold Star Memorandum at 19.

Instead, the Court must determine whether the Board acted properly in remanding the matter to Whatcom County to adopt GMA-compliant Designation Descriptors prior to designating LAMIRD boundaries in the 2005 WCCP.¹² CP 1562-1564. Since Gold Star presents no argument or authority to establish that the Designation Descriptors in the 2005 WCCP were consistent with GMA requirements, there can be no question that the Board acted properly in taking this action.

Futurewise presented substantial evidence that the Designation Descriptors in the 2005 WCCP did not incorporate or abide by the LAMIRD requirements established in RCW 36.70A.070(5)(d). CP 684-686; 1546-1583. As such, the Board correctly determined that the

¹² The present case does not resemble the *Whittaker v. Grant County*, EWGMHB No. 99-1-001-9 (2004). Gold Star Memorandum at 22-23. In *Whittaker*, the Board was able to review the sufficiency of the LAMIRDs, while in the present case, the Board could not even address the LAMIRDs because Whatcom County had not adopted appropriate criteria for its Designation Descriptors. CP 1546-1583.

Designation Descriptors were “clearly erroneous.” CP 1556-1562, 1576-1577. Gold Star presents no argument to the contrary in its Response Brief, which is consistent with the fact that neither Whatcom County nor Gold Star presented any evidence or argument before the Board to establish that the Designation Descriptors complied with GMA requirements.¹³ CP 1080-1102, 1410-1419, 1626.

The Board then concluded, correctly, that it could not determine whether the LAMIRD boundaries in the 2005 WCCP complied with RCW 36.70A.070(5)(d) because the LAMIRD designations were based on invalid Designation Descriptors. CP 1562-1564. Thus, Whatcom County’s failure to revise the LAMIRD Designation Descriptors in compliance with RCW 36.70A.070(5)(d) necessarily meant that the LAMIRD boundaries in the 2005 WCCP could not have been mapped in accordance with GMA requirements.¹⁴ CP 1562-1564. The Board acted appropriately by remanding the matter to Whatcom County to adopt

¹³ Whatcom County promised the Board that it would abide by the GMA, and then conceded that these five separate Designation Descriptors did not meet the LAMIRD criteria established in RCW 36.70A.070(5)(d). CP 1626.

¹⁴ GMA-compliant Designation Descriptors are required to establish a basis for the LAMIRD boundaries in a Comprehensive Plan. The Board noted that the Designation Descriptors failed to limit development to areas of the built environment as of July 1990, which would not minimize development as required by law. CP 44. Because the “logical outer boundaries” for the LAMIRD designations in the 2005 WCCP were never formed or adopted according to the proper statutory criteria, the Board characterized them as “proto-LAMIRDs.” CP 1555 at fn. 3; CP 1562-1564; RCW 36.70A.070(5)(d).

GMA-compliant LAMIRD Designation Descriptors, and to establish a record in support of the analysis and mapping of the LAMIRD boundaries in the 2005 WCCP. CP 1562-1564.

D. The Doctrines of Res Judicata and Collateral Estoppel Neither Apply Nor Override the Periodic Review Requirements of RCW 36.70A.130.

The fact that the 1998 WCCP was subject to a prior legal challenge has no bearing on the fact that: (1) the WCCP was updated in 2005, as required by RCW 36.70A.130(1)(a); and (2) the provisions of the 2005 WCCP did not comply with GMA requirements. Put another way, the GMA requirements for periodic review of Comprehensive Plans and development regulations are not eradicated by inapplicable judicial doctrines. Therefore, Gold Star's reliance on the doctrines of res judicata and collateral estoppel is misplaced.

The inaccuracy of Gold Star's position is confirmed by Gold Star's inability to establish the mandatory requirements for each doctrine. Both res judicata and collateral estoppel require an identity of the parties involved. *Somsak v. Criton Technologies/Heath Tena, Inc.*, 113 Wn. App. 84, 92, 52 P.3d 43 (2002); *Christensen v. Grant Co. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). Gold Star ignores over this mandatory requirement by arguing that the "two main parties - the

Western Washington Growth Management Hearings Board and Whatcom County” were involved with the appeals of the 1998 WCCP and the 2005 WCCP. Gold Star Memorandum at 16. With this superficial submission, Gold Star implicitly acknowledges that Futurewise was neither a party to nor a participant in the appeal of the 1998 WCCP.

Moreover, Gold Star’s theory that the presence of the Board establishes an identity of the parties would gut the doctrines of res judicata and collateral estoppel in appeals of Board decisions under the APA, Chapter 34.05 RCW. The Board is always a nominal party to an appeal of a Board decision, but may not itself participate in an appeal other than on procedural grounds. *Kaiser Aluminum & Chemical Corp. v. Dep’t of Labor and Indus.*, 121 Wn.2d 776, 854 P.2d 611 (1993). Allowing the presence of the Board to meet the “same party” test ignores one of the fundamental tenets of the doctrines of preclusion – that the party estopped already had a full and fair opportunity to argue the merits of the claim. *Christensen*, 152 Wn.2d at 308-09. The doctrines of issue preclusion and claim preclusion are not intended to block the ability of a separate party¹⁵ from filing an appropriate legal challenge to an entirely new version of a Comprehensive Plan, particularly when such revision and challenge is

¹⁵ Gold Star does not challenge or even address the fact that Futurewise is not in privity with any of the parties involved with the legal challenge to the 1998 WCCP.

explicitly authorized by statute. RCW 36.70A.130(1)(a); .280.

Res Judicata and Collateral Estoppel also require an identity of the subject matter and cause of action. Here, there is no such identity because the prior challenge to the 1998 WCCP is separate and distinct from the challenge to the 2005 WCCP. Each case involved challenges to different LAMIRD designations adopted at a different time under a different Comprehensive Plan.

Gold Star's allegation that "[t]he LAMIRDS are the same in both versions" of the WCCP is irrelevant, because every seven years Whatcom County was required to establish that the LAMIRDS designated in the WCCP satisfied GMA requirements. RCW 36.70A.130(1)(a); Gold Star Memorandum at 17. The subject matter and cause of action are different because the legislative enactments are different.

As a matter of policy, adoption of Gold Star's position that the LAMIRD designations in the 1998 WCCP are "identical" to the LAMIRD designations in the 2005 WCCP eviscerates the requirements of RCW 36.70A.130(1)(a).¹⁶ And as a matter of law, Futurewise's challenge to

¹⁶ Gold Star references two cases in support of its theories on res judicata and collateral estoppel. *LeJeune v. Clallam County*, 64 Wn. App. 257, 823 P.2d 1144 (1992); *Christensen v. Grant County Hospital*, 152 Wn.2d 299, 96 P.3d 957 (2004). Such references are misplaced, as neither of these cases involved a statutory mandate requiring a cyclical and continuous process of review, update, and revision to a prior government determination.

Whatcom County's decision in 2005 not to revise the LAMIRDs (a decision that Whatcom County had not even considered in 1998) does not involve: (1) rights or interests established in the prior judgment which would be destroyed or impaired by prosecution of the second lawsuit; (2) the same evidence presented in the two suits; (3) infringement of the same right; and (4) the same transactional nucleus of facts. *Hisle v. Todd Pac. Shipyards Corp.*, 113 Wn. App. 401, 412, 54 P.3d 687 (2002).

Finally, the application of either res judicata or collateral estoppel here would represent an injustice not only to Futurewise, but also to all citizens who depend on sensible land use planning to protect their quality of life. *See* RCW 36.70A.010. Validation of Gold Star's argument would preclude Futurewise, or any other party, from ensuring that local jurisdictions undertake the required periodic review of its Comprehensive Plan and development regulations to ensure compliance with established principles of growth management. RCW 36.70A.130(1)(a). In essence, acceptance of Gold Star's argument would force the citizens of Washington to accept and live with non-compliant provisions within their Comprehensive Plans and development regulations without any possibility of review or appeal, despite the GMA's mandate of continuing periodic review. The Legislative never intended such consequences, and enacted

specific statutory language to ensure that prior mistakes, changes in statutory language,¹⁷ and changing conditions are addressed and updated through a periodic and continuous process of review and revision. RCW 36.70A.130(1)(a).

In sum, the doctrines of res judicata and collateral estoppel are not applicable in this matter. Gold Star has failed to establish all of the required elements, while Futurewise has proven that the preconditions of each doctrine cannot be met. More importantly, Gold Star's proposed application is inconsistent with the relevant statutory authority. The Whatcom County Superior Court erred in ruling otherwise, and therefore, the Board's FD&O should be reinstated in its entirety.

E. Whatcom County Conceded that Rural Densities in the 2005 WCCP Violated the Requirements of the GMA

Whatcom County conceded that certain Rural Densities established in the 2005 WCCP would not prevent sprawl and protect rural lands and rural character as required by the GMA. RCW 36.70A.020(2); .070(5)(b); .130; CP 1566-1568. After reviewing the substantive evidence in the record, including Whatcom County's concession, the Board concluded that Rural Densities in the 2005 WCCP did not comply with GMA requirements. CP 1566-1568.

¹⁷ The GMA has been amended every year since its adoption in 1990.

Gold Star never addresses the fact that Whatcom County has conceded, both in writing and at oral argument, that certain Rural Densities in the 2005 WCCP violated GMA requirements. CP 1093-94; 1566-1568. Instead, Gold Star focuses entirely on the holding in *Viking Properties* regarding the alleged imposition of a “bright-line rule.”¹⁸ *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005).

The holding in *Viking Properties* does not prohibit Growth Boards from examining the evidence presented, evaluating the arguments of each party, and determining on an independent basis whether specific aspects of a comprehensive plan are inconsistent with the policies and provisions of the GMA. That is what the Board did in the present case: (1) the Board reviewed the evidence which established that certain Rural Densities in the 2005 WCCP would interfere with rural uses and destroy rural character; (2) the Board acknowledged the concession by Whatcom County that the challenged Rural Densities in the 2005 WCCP were inconsistent with GMA requirements; and (3) the Board determined independently that the challenged Rural Densities in the 2005 WCCP were invalid. CP 1546-1583. The holding of *Viking Properties* is therefore not relevant to the analysis, because the Board never imposed a “bright-line rule.”

¹⁸ In doing so, Gold Star attempts to enforce a “bright-line rule” of its own – any decision that negatively impacts its property is invalid as a matter of law.

F. Gold Star's Failure to Argue Rural Densities Before the Board Precluded the Issue Being Raised Before the Whatcom County Superior Court

Issues not raised before the agency (*i.e.* the Board) may not be raised on appeal except in very limited circumstances. RCW 34.05.554; *King County v. Washington State Boundary Review Bd.*, 122 Wn.2d 648, 668-71, 860 P.2d 1024 (1993). Gold Star never raised the issue of Rural Densities before the Board, a fact which Gold Star does not dispute. CP 1410-1419. Instead, Gold Star decided to adopt Whatcom County's arguments on Rural Densities by reference, which necessarily included Whatcom County's concession that the challenged Rural Densities designations under the 2005 WCCP were inconsistent with the GMA.¹⁹ CP 1410-1419, 1698-1699. Gold Star chose its path before the Board, and cannot "change course" and raise new arguments after it has been disappointed by the results of their choice.

Gold Star's attempted reliance on the *Viking Properties* case as new authority ignores the fact that the case was decided over 30 days prior to the issuance of the Board's decision on September 20, 2005. CP 1546-1583. Thus, there has been no change in controlling law occurring after

¹⁹ If Gold Star wishes to rely on RAP 2.5(a) in arguing that the issue was sufficiently developed before the Board, then Gold Star once again relies entirely on Whatcom County's concession that the Rural Densities under the 2005 WCCP failed to comply with GMA requirements. CP 1093-94; CP 1566-1568; Gold Star Memorandum at 29.

the agency action, *i.e.* the Board's decision on September 20, 2005.²⁰
RCW 34.05.554(1)(d)(i); CP 1582. Therefore, there is no basis for
substantively addressing the issue of Rural Densities in this appeal.

III.
CONCLUSION

The Superior Court erred in: (1) denying Futurewise's motion to
strike all of Gold Star's arguments regarding Rural Densities; (2) reversing
the Board's Conclusions of Law concerning LAMIRDs; and (3) reversing
the Board's Conclusion of Law concerning Rural Densities. The Order
from the Superior Court should be overturned, and the FD&O from the
Board should be reinstated in its entirety.

DATED this 12th day of March, 2007.

Respectfully submitted,

RIDDELL WILLIAMS P.S.

By: 

Ken Lederman, WSBA No. 26515
Shata Stucky, Rule 9 Legal Intern
Co-Counsel for Futurewise

²⁰ Neither Whatcom County nor Gold Star moved to supplement the record with
additional legal argument based on the *Viking Properties* case. CP 1548-1549.

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

GOLD STAR RESORTS, INC.,

Petitioner,

v.

FUTUREWISE and WHATCOM
COUNTY,

Respondents.

58379-4

NO. 05-2-02405-1

DECLARATION OF SERVICE

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 MAR 13 PM 12:02

I, Darla Holterman, declare as follows:

1. I am over 18 years of age and a U.S. citizen. I am employed as a legal secretary by the law firm of Riddell Williams P.S.

2. On March 13, 2007, I caused to be delivered true and accurate copies of the following documents:

1) Reply Brief of Futurewise; and

2) Declaration of Service

on the following by service method indicated below:

Jack O. Swanson
Belcher, Swanson, Lackey, Doran, Lewis
Battersby Field Professional Bldg.
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Bellingham, WA 98225-3105
Via US Mail

DECLARATION OF SERVICE - 1

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031207 1510/61985.00003

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Via Hand Delivery

I declare under penalty of perjury of the laws of the State of Washington,
that the foregoing is true and correct.

DATED at Seattle, Washington on March 13, 2007.


Darla K. Holterman